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ABATEMENT AND SURVIVAL OF ACTIONS FOR FRAUD.

At common law an action was abated by the death of either party, and could not be revived by or against the personal representative. If the cause of action survive it was necessary to bring a new action. As a general rule the cause of action survived where the action was *ex contractu* and abated where it was *ex delicto*. As to causes of action which survive, the common-law rule has been altered by statute, under which the action may be revived and a new action is not necessary. The distinction between causes of action which survive and those which abate has not been materially changed by statute and the common-law distinction must still be referred to.

The Virginia Code, § 2655, provides that "an action of trespass, or trespass on the case, may be maintained by or against a personal representative for the taking or carrying away any goods, or for the waste or destruction of, or damage to, any estate of or by his decedent." This provision is remedial and should be liberally construed. *Lee's Adm'r v. Hill*, 87 Va. 503, 12 S. E. 1052, 24 Am. St. Rep. 666.

In *Hooper v. Gorham*, 45 Me. 209, 213, it is said: "Judicial expositions of the statutes, which have been passed touching the survivorship of actions and causes of action, seem to have been made in the same liberal spirit which has led to the various enactments. If the language of a statute will allow it, no reason is perceived why such a construction should not be adopted as will give to executors and administrators, for the benefit of heirs or creditors as the law may require, authority to institute or maintain suits for the recovery of such damages as the deceased party, whom they represent, may have suffered in his lifetime, either in his person or his property, by reason of the tortious or other acts of any person, in the same manner as the party injured might have done if living."

FORM AND CAUSE OF ACTION.

While as a general rule the form of an action determines its survivability, this is not an invariable test. In determining whether an action survives, it is immaterial whether its form be

in tort or in contract, provided the cause of action is founded on contract. *Booth v. Northrop*, 27 Conn. 325.

The true test is, not so much the form of the action, as the nature of the cause of action. *Lee v. Hill*, 87 Va. 497, 24 Am. St. Rep. 666, 668. In determining whether a cause of action survives the death of a party, the real nature of the injury or claim ought to be regarded, and not the form of the remedy by which it is sought to be redressed or enforced. *Booth v. Northrop*, 27 Conn. 325, 331. In *Schreiber v. Sharpless*, 110 U. S. 76, 80, it is said: "The right to proceed against the representatives of a deceased person depends not on forms and modes of proceedings in a suit, but on the nature of the cause of action for which the suit is brought. * * * Whether an action survives depends on the substance of the cause of action, not on the forms of proceedings to enforce it."

At common law, personal actions died with the person, *actio personalis moritur cum persona*; and this has been construed to mean all torts where the action is in form *ex delicto* for the recovery of damages, and the plea is not guilty. 1 *Saund.* 216a, note 1; *Henshaw v. Miller*, 17 How. 212, 219; *Tufts v. Matthews*, 10 Fed. 609, 610.

Where the cause of action is a tort unconnected with contract, and affects the person only, and not the estate, such, for instance, as assault, libel, slander and the like, the action dies with the person; but, where the action is founded on contract, it is virtually *ex contractu*, although nominally in tort, and, in such case, the action survives. See *Norfolk, etc., R. Co. v. Read*, 87 Va. 189, 12 S. E. 395. See note to *Boor v. Lowery*, 103 Ind. 468 in 53 Am. Rep. 525. In *Lee v. Hill*, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666, it is said: "The true test is, not so much the form of the action, as the nature of the cause of action. Where the latter is a tort unconnected with contract, and which affects the person only, and not the estate, such as assault, libel, slander, and the like, there the rule *actio personalis*, etc., applies. But where, as in the present case, the action is founded on a contract, it is virtually *ex contractu*, although nominally in tort, and there it survives."

As a general rule a cause of action for damages for fraud or deceit is *ex delicto* and does not survive the death of the plain-

tiff or defendant. To this rule there are two exceptions, the first is that the action does not survive where the cause of action is a breach of a fiduciary or trust relation, and the second is that the action survives the death of the plaintiff where his estate is diminished or the death of the defendant where his estate is benefited by fraud or deceit. *Forrester v. Southern Pac. Co.* (Nev.), 134 Pa. 753; *Thompson v. Seattle, etc., R. Co.*, 71 Wash. 436, 128 P. 1070. And in *Ten Eyck v. Runk*, 31 N. J. L. 428, 431, the court, commenting on the liberal construction which the statute of 4 Edw. III, authorizing an executor to maintain actions of trespass for chattels taken and carried away in the lifetime of his testator, has always received, said: "This we find exemplified in many decisions, as, that an executor could maintain either trespass or trover. Russell's case, 5 Rep. 27. So an action for a false return. *Williams v. Cary*, 4 Mod. 403. For an escape. *Berwick v. Andrews*, 2 Ld. Raym. 973. Debt on judgment against an executor suggesting a devastavit. 1 Salk. 314. And many other actions of a like kind for injuries done to the personal estate of the testator in his lifetime. 1 Saund. 216C, noted; 1 Wm. Exrs. 704." See 1 *Corpus Juris*. 177.

Action for Breach of Promise of Marriage.—According to the common-law maxim that all personal actions die with the person, it has been held that neither under the common law nor the statute, can an action for the breach of promise to marry be maintained against the representative of the promisor; and this rule is not changed by the statute declaring that the representative of the decedent may sue and be sued for any injury done to or suffered by the personal estate of his decedent in his lifetime. *Flint v. Gilpin*, 29 W. Va. 740, 3 S. E. 33; *Grubb v. Sult*, 32 Gratt. 203, 34 Am. Rep. 765; *Lee v. Hill*, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666; S. C., 84 Va. 919, 6 S. E. 473; *Burton v. Mill*, 78 Va. 482. In *Henshaw v. Miller*, 17 How. (U. S.), 212, 219, 15 L. Ed. 222, it is said: "For the breach of a promise to marry, although the action is in form ex contractu, yet the cause of action being in its nature personal, the executor of the party to whom the promise was made cannot sue."

Action for False Warranty.—An action for a false warranty, although in form an action in tort, is yet founded on the contract of warranty, and therefore is not abated by the death of

the plaintiff during its pendency. In *Booth v. Northrop*, 27 Conn. 325, quoted in *Lee v. Hill*, 87 Va. 497, 24 Am. St. Rep. 666, 668, it is said: "On the question of survivorship, we consider it immaterial whether the form of the remedy adopted is in tort or in contract, provided the cause of action is founded on a contract. The form of action brought to redress a wrong sometimes, and indeed usually, indicates its nature, whether as arising independently of contract or not; but this is far from being invariably so, there being many cases where the action, the cause of which grows out of a breach of contract, may be in form either *ex delicto*, as in case, or *ex contractu*, as in *assumpsit*. In determining whether a cause of action survives to the personal representatives, the real nature of the injury or claim ought to be regarded, and not the form of the remedy by which it is sought to be redressed or enforced."

Action of Trover.—“A century ago an action of trover was brought against an administrator with the will annexed for the conversion of property by his testator; *Hambly v. Trott*, Cowp. 371; and a verdict having been obtained for the plaintiff, the question arose whether the judgment should be arrested. It was twice argued, and there was such equity in the plaintiff that the court seemed desirous in some mode to sustain the action. The testator in his lifetime had converted valuable property to his own use, which was then a part of the assets of his estate. So unjust it was that this property should go to his heir, and not to the true owner, that the justices of the court, and especially Lord Mansfield, struggled to find a mode in which such injustice could be averted. He said repeatedly during the argument of counsel, that, although technically and strictly an action of trover was an action *ex delicto*, yet that substantially and really it was, as he termed it, an action of property. During the last argument of the case he is reported to have said, ‘An action of trover is not now an action *ex maleficio*, though it is so in form;’ and also, ‘In substance, trover is an action of property. If a man receives the property of another, his fortune ought to answer it.’ But after the second argument, the court wished to advise, and substantially ordered the judgment to be arrested; and Lord Mansfield, in delivering the unanimous opinion of the court, pointed out with great ingenuity the distinction between a wrong

done or a trespass committed by a person, and the property acquired in consequence of such wrong or trespass, and said that for the act itself there could be no action against his executor after his death, yet in consequence of the act there might be such an accretion of property to his estate as that, *ex aequo et bono*, the executor should not hold it against the true owner, but that an equitable action for money had and received might be had against the administrator for the value of the property." *Chase v. Fitz*, 132 Mass. 359, 364.

Action for Breach of Trust or Fiduciary Relation.—An action for a fraud which is a breach of a fiduciary or trust relation survives the death of either party. See *Nichols v. Campbell*, 10 Gratt. 560. The relation may exist between a principal and agent or broker, between an attorney and client, between an officer of a corporation and the corporation, between a guardian and ward, between partners and between a trustee and beneficiary. See 1 C. J. 178.

Where the owner of a parcel of land employs a broker to sell it for him, and the broker, by fraudulent representations respecting the value of another parcel of land, induces him to make a conveyance of his land to a third person, also a party to the fraud, and to take in exchange the parcel concerning which the representations were made, and the third person conveys the land to a purchaser in good faith, and takes a mortgage to secure a part of the purchase money, a bill in equity by the person so wronged, in which he seeks to obtain an assignment of the mortgage, and restitution in damages, is not terminated by the death of the plaintiff. *Cheney v. Gleason*, 125 Mass. 166.

But where the breach is of a mere naked or dry trust, and the trustee is not benefited thereby, the cause of action does not survive. *Houghton v. Butler*, 166 Mass. 547, 44 N. E. 625.

PLAINTIFF'S ESTATE DIMINISHED.

Where the effect of the fraud or deceit is to diminish the real or personal estate of the injured party, as distinguished from a mere personal injury, a cause of action survives to his representative. If the executor can show that damage has accrued to the personal estate of the testator by the breach of an express or implied promise, he may well sustain an action at common law,

to recover such damage, although the action is in some sort founded on a tort. *Boor v. Lowrey*, 103 Ind. 468, 53 Am. St. Rep. 519, 522. See also, *Tichenor v. Hayes*, 41 N. J. L. 193; s. c. 32 Am. Rep. 186. Where there was a promise and a breach of it in the lifetime of the testator, resulting in an injury to his personal property, an action in assumpsit may be maintained to recover for such injury. *Boor v. Lowrey*, 103 Ind. 468, 53 Am. St. Rep. 519, 522.

Under a statute providing that a cause of action of trespass on the case for damages to personal estate shall survive, an action against a person convicted of the larceny of personal property, and in favor of the owner of the property taken, survives the death of the owner, for the injury sustained by him must necessarily result in direct and immediate damage to his personal estate. *Aylsworth v. Curtis*, 19 R. I. 517, 61 Am. St. Rep. 785.

In *Stanley v. Vogel*, 9 Mo. App. 98, 101, it is said: "The general effect of the first section is to put property rights arising from tort on the same basis as property rights arising out of contract. Thus, actions in tort for injuries done to personal property by the testator now survive against the executor."

"The effect of § 2655 of the Code is to make all actions for wrong to property revivable for or against representative." *Anderson v. Hygeia Hotel Co.*, 94 Va. 687, 24 S. E. 269. In the provision of the Code above set out the word "estate" is used in the most comprehensive sense. *Lee's Adm'r v. Hill*, 87 Va. 503, 12 S. E. 1052, 24 Am. St. Rep. 666. The term "goods" as there used is broad enough to include money, and an action may be maintained for money illegally collected by decedent as collector of internal revenue. *Patton v. Brady*, 184 U. S. 608, 22 Sup. Ct. 493, 46 L. Ed. 713.

Injury to Specific Property.—It has been held that the damage done must be to some specific property of which the person is the owner. It is not sufficient if the damage arises incidentally or collaterally. False representations by which one is induced to part with property generally do not appear to come within the provisions of the statute. *Tufts v. Matthews*, 10 Fed. 609, 611, citing *Read v. Hatch*, 19 Pick. 47; *Cutting v. Tower*, 14 Gray, 183; *U. S. v. Daniel*, 6 How. 11; *Henshaw v. Miller*, 17 How. 212.

Injury to the Person.—There is in this connection a distinction between causes of action which affect the estate and those which affect the person only. *Chase v. Fitz*, 132 Mass. 359, 366. Where the cause of action is tort unconnected with contract, and affects the person only and not the estate, the action dies with the person. *Lee v. Hill*, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666; *S. C.*, 84 Va. 919, 6 S. E. 473; *Flint v. Gilpin*, 29 W. Va. 740, 3 S. E. 33. An action of trespass on the case in assumpsit, brought to recover damages for personal injuries alleged to have been sustained by the plaintiff through the negligence of the defendant, does not survive. *Birmingham v. Chesapeake, etc., R. Co.*, 98 Va. 548, 37 S. E. 17. "That an action, the purpose of which is to recover for an injury to the person, cannot be maintained after the death of the person committing the injury, is, we think, supported by all the authorities, and this too regardless of the form in which it is brought." *Boor v. Lowrey*, 103 Ind. 468, 53 Am. St. Rep. 519, 522. Tort actions for wrong to property, real or personal, or which grow out of breach of contract, but not for wrongs done to the person or reputation, or any purely personal wrong, apart from property or contract survive to or against the personal representative. Virginia statute. *Winston v. Gordon*, 115 Va. 899, 916, 80 S. E. 756.

At common law, personal actions died with the person and could not be revived either by or against the personal representative, and this rule has not been altered in this state in respect of an injury done to the person. Such an action still dies with the person, and no right of action for such an injury survives to his personal representative. *Beaver v. Putnam*, 110 Va. 713, 67 S. E. 353. In *Anderson v. Hygeia Hotel Co.*, 92 Va. 687, 24 S. E. 269, Judge Riley said: "But while the rule of the common law has been much restricted and limited by statutes, both in England and in this country, and the right to sue for an injury done to the property or estate of the decedent in his lifetime has been conferred on the personal representative of the deceased, the rule has not been altered in this state in respect of an injury done to the person. An action for an injury to the person still, as at common law, dies with the person, and no right of action for such injury survives to his personal representatives." See *Beavers v. Putnam*, 110 Va. 713, 715, 67 S. E. 353. A breach of promise to

marry, or a breach of the implied contract of a medical practitioner, or of an attorney, to exercise skill in his profession, and other injuries of a personal nature, although arising *ex contractu*, that might be mentioned, constitute exceptions to the rule, unless, indeed, some special damage to the personal estate can be stated on the record. *Lee v. Hill*, 87 Va. 499, 12 S. E. 1052, 24 Am. St. Rep. 666; *S. C.*, 84 Va. 919, 6 S. E. 473. As to actions for death by wrongful act see *Va. Code*, §§ 2902-6.

Pecuniary Loss.—It seems to be necessary that the action, in order to survive, must be one for damages to the personal or real estate of the plaintiff, and not a mere pecuniary loss. The injury must be to property. *Anderson v. Hygeia Hotel Co.*, 92 Va. 687, 24 S. E. 269. It is said in *Jenks v. Hoag*, 179 Mass. 583, 586, 61 N. E. 221: "It has been decided repeatedly that 'a mere fraud or cheat by which one sustains pecuniary loss cannot be regarded as a damage done to personal estate.' *Leggate v. Moulton*, 115 Mass. 552, and cases there cited. See also, *Cutter v. Hamlen*, 147 Mass. 471, 18 N. E. 397, 1 L. R. A. 429. The statute was 'intended to give a remedy which should survive only for injuries of a specific character to real or personal estate.'" See *Rockwell v. Furness* (Mass.), 102 N. E. 914.

Direct Injury.—The injury to the property of the decedent must be direct and not indirect or consequential. In *Jenkins v. French*, 58 N. H. 532, it was held that where the cause of complaint is for injury to property, to which a personal injury is merely an incident, the action survives, but where the cause of action is for an injury to the person, and property is merely incidentally affected, it does not survive. To the same effect is *Wolf v. Wall*, 40 Ohio St. 111. See *Boor v. Lowrey*, 103 Ind. 468, 53 Am. St. Rep. 519, 524.

The damages allowed to be recovered by or against a personal representative under the Virginia Code are direct damages to property, and not those which are merely consequent upon a wrongful act to the person only. *Mumpower v. Bristol*, 94 Va. 737, 27 S. E. 581, 3 Va. Law Reg. 439, note. In *Birmingham v. Chesapeake & Ohio Ry. Co.*, 98 Va. 548, 552, 37 S. E. 17, it is said: "A claim for indirect and incidental damages to the plaintiff's estate, arising from an injury purely personal in its

nature, does not cause the action, brought to recover for such injuries, to survive. *Mumpower v. City of Bristol*, 94 Va. 737."

In *Henshaw v. Miller*, 17 How. 212, which was an action on the case for a false representation as to the credit of another, whereby the plaintiff was induced to part with his property, it was held that the action died with the person; that the act complained of was not a direct, but only an indirect or consequential, injury to the plaintiff's property, and therefore not within the statute of Virginia, in which state the case arose. In other words, that it was a mere fraud or cheat, which, although it occasioned loss to the plaintiff, could not be regarded within the meaning of the statute as a damage to his estate. This view is concurred in *Lee v. Hill*, 87 Va. 497, 24 Am. St. Rep. 666, 671. Therefore an action for maliciously and without probable cause suing out an injunction against a plaintiff whereby the operation of his mill was suspended would not survive. *Mumpower v. Bristol*, 94 Va. 737, 27 S. E. 581, 3 Va. Law. Reg. 439.

DEFENDANT'S ESTATE INCREASED.

At common law the rule is that if a person increased his own estate by wrongfully acquiring another's property by fraud or deceit, an action against him survives his death and may be revived against his personal representatives. *Patton v. Brady*, 184 U. S. 608, 614, 46 L. Ed. 713. Actions for wrongs done to property, or interests in property, survive, at least, so far as the act of the offender is beneficial to his estate. If, by the wrong, property is acquired by the wrongdoer whereby his estate is benefited, an action in some form will lie against the executor to recover the value of the property. See extended note to *Boor v. Lowrey*, 53 Am. Rep. 529, 531; note to Payne's Appeal, 48 Am. St. Rep. 226. Note to *Aylsworth v. Curtis*, 19 R. I. 517, 61 Am. St. Rep. 785, 790.

In *Hambly v. Trott*, Cowp. 371, Lord Mansfield said: "Where property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor." In note to Payne's Appeal, 65 Conn. 397, in 48 Am. St. Rep. 215, 226, it is said: "An action for a wrong done does not survive against the representatives of the wrongdoer, if he

or his estate received no benefit from the wrong: *Osborn v. Belt*, 5 Denio, 370; Am. Dec. 275; note to *Hecht v. Skaggs*, 22 Am. St. Rep. 194; but, so far as the act of the offender is beneficial, his assets ought to be answerable, and his executor chargeable: note to *Boor v. Lowrey*, 53 Am. Rep. 529. In *Baker v. Crandall*, 78 Mo. 584, 47 Am. Rep. 126, it is held that a cause of action for deceit survives to the legal representatives of the injured party." For additional cases, see 1 *Corpus Juris*, 195, and 52 L. R. A., N. S., 885, note.

Property Acquired.—"A right of action arising out of a personal injury does not survive against the wrongdoer's legal representatives, unless he, by the wrongful act, acquired specific property, by which, or by the proceeds of which, the assets in the hands of such representatives have been increased. That benefit resulted to him, or that he was saved expense, by which his estate has been increased, is not enough." Headnote to *Payne's Appeal*, 65 Conn. 397, 48 Am. St. Rep. 215.

But under the Virginia Code trover may be sustained against a personal representative as such, though the goods never came into his hands. *Ferrill v. Brewis' Adm'r*, 25 Grat. 765.

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